SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 963

DR. ROY F. MACK,
Petitioner,

vs.

THE FLORIDA STATE BOARD OF DENTISTRY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I

OPINIONS BELOW

The petitioner, Dr. Roy F. Mack, seeks a writ of certiorari to review the judgment and the decision, insofar as it was unfavorable to him, of the United States Court of Appeal, Fifth Circuit, in the case of *Mack* v. *The Florida State Board of Dentistry*, Case No. 28,085. The Fifth Circuit opinion and judgment are not yet reported; they are attached hereto as Appendix A and B. The decision af-

firmed in part and vacated in part a decision of the United States District Court for the Southern District of Florida, reported as *Mack v. Florida State Board of Dentistry*, S.D. Fla.1969, 296 F.Supp. 1259, which is also set forth in Appendix D.

II

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The opinion and judgment of the United States Court of Appeals, Fifth Circuit, were dated July 7, 1970 (Appendix A, B). A petition for rehearing and petition for rehearing in banc were denied on August 17, 1970 (Appendix C).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1254(1) and 28 U.S.C., §2101(c).

III

QUESTIONS PRESENTED FOR REVIEW

1. Whether the standard of proof "beyond a reasonable doubt" is constitutionally required by the Fourteenth Amendment in a State professional disciplinary proceeding.

2. Whether the "mixing of functions" present, as the District Court found, to an "extreme" degree in the State professional disciplinary proceeding involved in this case and apparently not otherwise uncommon, may under the Fourteenth Amendment be constitutionally sustained or repeated.

3. Whether, after Federal Courts have determined that a State professional disciplinary proceeding had been conducted in a constitutionally invalid manner, the Federal Courts should nonetheless permit the discipline which

resulted from such a hearing to remain in effect pending another hearing ordered by the Courts.

4. Whether the Court of Appeals properly remanded a State professional disciplinary proceeding, in which the fact-finding process in a prior hearing had been found to have been unconstitutionally tainted, for a "new" determination and hearing by the same fact-finders who had been involved in the earlier one.

IV

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, Section 1, United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

42, United States Code, §1983, 17 Stat. 13:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

V

STATEMENT OF THE CASE

The decision of the District Court, Ted Cabot, J., fairly and comprehensively sets forth the jurisdictional bases of the action below, the essential facts involved, and the initial contentions of the plaintiff in the trial court, the

appellee-cross-appellant in the Court of Appeals, and the petitioner here, Dr. Roy F. Mack. At 296 F.Supp. 1260-1262 (See Appendix D), the District Court stated as follows:

> "This is a civil rights suit brought by a dentist whose license was revoked by the defendant. The action is brought under the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Fourteenth Amendment of the Federal Constitution. The Court has jurisdiction both under the Federal Question Statute, 28 U.S.C. §1331 (the Court finding that the value of the nature of the right sought to be protected is in excess of $10,000.00 exclusive of interest and costs), and under the Civil Rights Jurisdiction Statute, 28 U.S.C. 1343(4).
>
> "Prior to April 1, 1966, plaintiff was a licensed practicing dentist in the Southern District of Florida. The defendant Florida State Board of Dentistry (the Board), formerly known as the Florida State Board of Dental Examiners, exists under Florida Statutes, Chapter 466, as a regulatory and disciplinary agency for the practice of dentistry in the State of Florida. As such, the Board's actions complained of in the instant suit were done under color of state law. Accordingly, any action by the Board was state action so as to raise the questions under the Fourteenth Amendment and the Civil Rights Act.
>
> "In the Fall of 1965 certain complaints concerning plaintiff's practice were received by the Board through its Executive Secretary, then a Dr. Robert M. Denton. At a Board meeting held in Homosassa Springs, Florida, on October 2, 1965, Dr. Denton reported to the board the fact of and nature of the complaints received concerning the plaintiff. Following the receipt of this information, the Board, apparently pursuant to its Rule 3.02, authorized Dr. Denton to more fully investigate the charges through the use of one Thor Behrans, a Miami private detective. During the progress of the investigation some or all of the members of the Board were kept 'well apprised' of its

progress, as were Dr. Denton and Mr. Richard Randle, attorney for the Board. In fact, Dr. Denton made one trip to Miami to personally interview some of the witnesses.

"The results of the investigation were made known to the Board under the authority of its Rule 3.03(a) and in late 1965, based on the investigation reports, the Board authorized the filing of an accusation against plaintiff, charging improper advertising of his name and services and misconduct which would bring discredit upon the dental profession. The accusation, which is in the nature of an indictment or information, was sworn to by Dr. Denton and then circulated to the members of the Board who authorized holding of a hearing. This procedure follows Rule 3.05(a),(c). The hearing was originally set for January, 1966, but because of some technical problems, it was required to be re-set and was held on February 18, 1966.

"During the pre-hearing stages of the case, Dr. Mack was represented by counsel who filed certain motions with the Board which were referred to Mr. Randle for disposal. Mr. Randle stated that the motions had been, at least in most respects, denied. It is unclear from the record whether this was an independent determination on the part of Mr. Randle or was delegated to him by the Board itself. In any event, at the hearing the Board apparently delegated to Mr. Randle and Dr. Denton the decisions concerning whether counsel could have access to the documents called for by the motions. While the hearing was purportedly an adversary proceeding, in effect Mr. Randle, the prosecutor, was acting on behalf of the Board both in prosecuting and in rendering legal advice. Mr. Randle sat with the members of the Board behind a table facing the accused. He often conferred with the Chairman concerning rulings out of the hearing of the court reporter or defense counsel. Prior to the hearing he had prepared a 'format' for the Chairman, the contents or existence of which were

unknown to opposing counsel. He was present during executive sessions taken by the Board to consider rulings concerning the trial. Although the Board purported to make independent rulings concerning evidentiary matters, some of which were of great importance at the trial, the record reveals that the Board, none of whom are lawyers, relied upon Randle to guide it in legal and evidentiary matters. As Dr. Farver, a Board member, candidly stated, 'Well, we have to rely on him for legal aid and we believe what he says. So, if he does not want to admit it, fine.'

"In sum, both under the rules of the Board, 3.06(a), and Mr. Randle's practice, his function was that of 'assisting the Board' in prosecuting the accused.

"At the conclusion of the hearing the Board adjourned until the following morning. At that time they met in executive session to consider the evidence and make a determination of guilt or innocence and to determine the punishment, if any. Both Dr. Denton and Mr. Randle were present during the course of the executive session. The plaintiff was found guilty and his license to practice dentistry was revoked. Mr. Randle was authorized to and did prepare the formal findings which merely track the accusation previously filed. It is stipulated between the parties that the standard of proof used by the Board was less than the so-called reasonable doubt test as employed in criminal trials.

"The plaintiff attempted unsuccessfully to overturn the revocation in the state courts, *Mack* v. *Pepper*, 192 So.2d 66 (Fla.3d Dist. 1966), cert.denied, 201 So.2d 551 (Fla.1967). Thereupon, this petition was filed.

"There are two questions to be decided by the Court, although discussed by defendant under four subdivisions. They are: (1) whether the Board, in proceedings to revoke a professional license such as this, is required to use the reasonable doubt test, and (2) whether the mixing of functions outlined in the

foregoing resulted in a deprivation of plaintiff's rights to procedural due process. It should be pointed out that the plaintiff does not complain here of a denial of proper notice, or counsel, or the right to confrontation and cross-examination. The scope of this review, insofar as the second question is concerned, is strictly limited to the constitutional propriety of the mixing of functions, as here outlined."

On the first point, the District Court held squarely that the "reasonable doubt" test was not constitutionally required by the Fourteenth Amendment in a State professional disciplinary proceeding. 296 F.Supp. at 1262 (See Appendix D)

On the "mixing of functions" issue which the trial court found to have been present in an "extreme degree", the District Court found for the plaintiff. The court held on this issue as follows at 296 F.Supp. 1262-1263 (See Appendix D):

"Turning to the second question, involving the charge of an unconstitutional mixing of functions, the facts here show an extreme example of the complaint of mixing. The adjudicator of fact, first, authorized an investigation, second, was kept well apprised of the facts as they developed, and finally, authorized the filing of the charges.

"In addition, at the hearing which was to be adversary in nature, the attorney, Mr. Randle, wore two hats: that of legal advisor to the supposedly impartial adjudicators of fact, as well as that of advocate for the prosecution. Prior to the proceedings, the Board in effect delegated to the prosecutor the function of making the decisions on motions made by the plaintiff's counsel. Furthermore, it is tacitly admitted that as to certain objections to questions propounded by Mr. Randle, the Board's legal advisor and prosecutor, he (Mr. Randle) in effect made the ruling.

"Thus, we have the anomalous situation of Mr. Randle asking a question, plaintiff's counsel objecting, whereupon the Board turned to Mr. Randle for advice as to whether his question was objectionable, and of course, when he said that it was not, the objection was overruled. Likewise, at the times when the Board went into executive session, once to consider admission of exhibits, and once to make a final decision, the Executive Secretary, who swore to the accusation and acted as a liaison between the Board and the investigations, as well as the prosecution, were present.

"Translating the proceedings into criminal procedural terms, we have here a dentist of twenty years' practice, who has permanently lost the privilege to practice his profession, as the result of pre-trial proceedings and final hearing where the petit jury was made up of the same members as the grand jury; where the prosecuting attorney acted in some respects as the judge; where the foreman of the grand jury and the chief investigator for the state (Dr. Denton) sat with the jury; and finally, when the jury retired to deliberate, they did so in the presence of the prosecuting attorney and the so-called chief investigator, Dr. Denton. Were this a criminal trial being discussed, it could only be characterized as foreign to our notions of fairness and justice and somewhat reminiscent of the Star Chamber proceedings which have hopefully been relegated to history.

"The contention by the Board here is that while these procedures would not pass muster in a criminal trial setting, they are perfectly all right where all the defendant has to lose is his privilege to practice a profession in which he has been engaged for over twenty years. However, we think that *In re Ruffalo*, ... U.S. ....., 88 S.Ct. 1222 (1968), teaches otherwise. That case, which involved the procedure followed in disbarment of a lawyer, held that these proceedings are adversary and of a quasi-criminal nature. Although *In re Ruffalo*, supra, dealt with notice as an element of

due process, the mixing of functions and appearance of unfairness such as we have here have not been beyond the condemnation of other courts. *American Cyanamid Co.* v. *Federal Trade Comm.*, 363 F.2d 757 (6th Cir.1966), and *Amos Treat & Co., Inc.* v. *Securities and Exchange Comm.*, 306 F.2d 260 (D.C.Cir. 1962), as well as state courts, *Glass* v. *Mackie*, 370 Mich. 482, 122 N.W.2d 651 (1963).

"Accordingly, it is apparent that the following actions of the Board, taken together, deprived the plaintiff of the fundamental fairness required by the Constitution:

"1. The adjudicator of fact being kept apprised of the facts of the investigation prior to the hearing.

"2. The adjudicator of fact having the authority to authorize the filing of an accusation.

"3. The legal advisor to the adjudicator of fact making decisions for the Board and also acting as prosecuting attorney.

"4. The prosecuting attorney being present during deliberative sessions where defense counsel was not accorded the same right.

"5. The Executive Secretary, who had charge of the investigation, being present during deliberative sessions of the adjudicator of fact."

Pursuant to this determination, the trial judge ordered the State Board to grant Dr. Mack a new hearing by an "independent" fact-finder. He rejected, however, Dr. Mack's contention that he should be restored to his pre-unconstitutional-hearing-status as a practicing Florida dentist. At 296 F.Supp. 1263, he ordered the following relief:

"While the requested relief of the plaintiff was restoration to his pre-hearing status, the Court is of the opinion that all he is entitled to is a new hearing with the procedures here condemned eliminated. This

> may be done by appointment of an independent special master or hearing officer for the purpose of taking testimony and making findings, or it may be done by such other procedures as may be devised so as to assure that fundamental fairness required by the United States Constitution and which was so noticeably lacking in the proceedings heretofore conducted by the Board."

Both the Board and Dr. Mack appealed from this decision to the Fifth Circuit Court of Appeals. The Board, as appellant, claimed error in the District Court's determinations that (a) the Board's "mixing of functions" had resulted in an unconstitutionally unfair hearing, forbidden by the Fourteenth Amendment; and (b) the Board was required to afford Dr. Mack a new hearing to be held in a constitutionally permissible manner. As cross-appellant, Dr. Mack claimed error in (a) the determination that the "beyond a reasonable doubt" test was not constitutionally required; and (b) the determination that he was not entitled to a restoration to his pre-hearing status despite the holding that the hearing which had deprived him of that status as a practicing dentist had been unconstitutionally conducted and thus ineffective.

In the decision of which review is here sought, the Fifth Circuit

> (a) Squarely rejected Dr. Mack's contention on the "reasonable doubt" issue;
>
> (b) Vacated the District Court's determinations on the "mixing of functions" question on the purported ground that it was not necessary to reach the issue, since it found, upon its own independent and *sua sponte* examination of the transcript of the Dental Board hearing, that it was not a valid hearing at all but "an ungoverned confrontation";

(c) Affirmed the District Court holding that, even though the Dental Board "hearing" was constitutionally ineffective, the dentist whose license was revoked because of it, was nonetheless not entitled to a restoration to his pre-hearing status; and

(d) Overruled the District Court's directions that the new hearing should be held without the "mixing of functions" the District Court found unconstitutional, but upon which the Court of Appeals said it was not required to pass. Instead, the Court of Appeals remanded the cause, with "no directions . . . as to the modus operandi of its hearing", for a new hearing to the Florida State Dental Board, the same men who had participated in and reached a decision upon the prior invalid hearing.

VI

ARGUMENT—REASONS FOR GRANTING THE WRIT

1. The determination of the Court of Appeals, affirming that of the District Court on this point, that the reasonable doubt test is not constitutionally required in State professional disciplinary proceedings involves an obviously important question of constitutional law which has not yet been squarely decided by this Court. It needs little argument to demonstrate the vast number of proceedings in every state to which a holding on this issue will apply. Accordingly, it seems clear that the issue is one which "has not been, but should be settled by this Court." Rule 19, 1(b).

Moreover, the holdings below seem contrary to the thrust of recent decisions of this Court on closely related issues. *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970), the Court held that the test was constitutionally required in a juvenile proceeding—whether character-

ized as "civil" or "criminal" in nature, 25 L.Ed.2d at 376—essentially because of the "transcending value," *Speiser* v. *Randall*, 357 U.S. 513, 525-526 (1958), of the interest at stake. It is submitted that this decision, taken together with other recent decisions which hold that one's right to a professional license *is* such an interest, *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Re Ruffalo*, 390 U.S. 544, 550-551 (1968), requires a decision on this issue contrary to that reached by the Courts below.

2. The Court of Appeals vacated the District Court's holding that the Board's "mixing of functions" was forbidden by the due process clause, and remanded the case to the Board without directions which would preclude a repetition of that tainted process. Accordingly, the Court of Appeals has essentially and simply reversed the District Court's determination that the pre-hearing and hearing procedures of the Board were improper. It seems obvious, again, that the extent to which the "mixing of functions" of State disciplinary Boards may constitutionally be permitted, raises a serious and important federal question which should be determined here. This issue, again, is the subject of nationwide concern and complaint, and of numerous lower court decisions.

In addition, again, it seems clear that the Fifth Circuit's vacating of the District Court holding was directly contrary to the force of the decisions of this Court on very similar issues.

It has long, but with increasingly recent frequency, been held that the Fourteenth Amendment requirements of procedural due process apply with special force to administrative proceedings which result, as did this one, in the destruction of a man's reputation, his right to practice his profession and his livelihood. See especially *Spevack*

v. *Klein*, 385 U.S. 511 (1967). The *Spevack* case, in which this Court held the Fifth Amendment, as incorporated in the Fourteenth Amendment, applied to state bar disciplinary proceedings, embodied the holding that a much wider range of guarantees, previously held applicable only to "criminal" proceedings, now apply to administrative hearings such as those involved here. Indeed, the entire "right-privilege" and "criminal-non-criminal" distinctions as to the requirements of due process, have virtually disappeared. E.g., *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957); *In re Gault*, 387 U.S. 1 (1967). See *U. S.* v. *Dickerson*, D.D.C.1958, 168 F.Supp. 899, 901, 902 (per Holtzoff, J.) rev'd on other grounds, 271 F.2d 487. As Justice Douglas stated in his dissent in *Cohen* v. *Hurley*, 366 U.S. 117, which became the law upon the overruling of that case in *Spevack*, supra:

> ". . . taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction, perhaps even more so."

The impropriety of the procedures involved before the dental board as a matter of due process requirements was essentially established, as the District Court noted, by this Court in *Re Ruffalo*, 390 U.S. 544 (1968). There the Court dealt with the propriety of state bar disciplinary proceedings which had resulted in a Federal Court disbarment of the attorney involved. Significantly relying upon *Spevack* v. *Klein*, supra, and the "juvenile case", *In re Gault*, supra, this Court stated at 390 U.S. 550-551:

> *"Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer.* Ex parte Garland, 4 Wall 333, 380, 18 L.Ed. 366, 369; Spevack v. Klein, 385 U.S. 511, 515, 17 L.Ed.2d 574, 577, 87 S.Ct. 625. He is accordingly entitled to *procedural due process*, which includes fair notice of the charge.

"• • • As Judge Edwards, dissenting below, said, 'Such procedural violation of due process would never pass muster *in any normal civil or criminal litigation*.' 370 F.2d at 462.

"*These are adversary proceedings of a quasi-criminal nature.* Cf. In re Gault, 387 US 1, 33, 18 L.ed 2d 527, 549, 87 S.Ct. 1428." [Emphasis supplied].

Even more recently, in *Goldberg* v. *Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 301, 90 S.Ct. 1011 (1970) this Court applied the same *Murchison* principles to a hearing on the revocation of welfare payments.

One can only say that the mixing of judicial-prosecutorial and investigative functions on *this* record was shocking in the extreme. Under a judicial system which condemns any extra-judicial receipt of information by the trier of fact, see *Turner* v. *Louisiana*, 379 U.S. 466 (1960) and any contact between the finders of fact and others, e.g. *Parker* v. *Gladden*, 385 U.S. 363 (1961) is simply impossible to square the proceedings in the Dental Board with the most elementary due process requirements. It is submitted that this Court should review the decision of the Court of Appeals approving them.

3. In affirming the determination that, despite the invalidity of the prior "hearing" which revoked his license, Dr. Mack must remain suspended pending a valid one, the Court of Appeals went much further in affecting an accused dentist's rights than the law of Florida. Under that law, F.S. Chap. 466, one's license may not be suspended or revoked until *after* a proper hearing by the Board. Prior to that hearing, while charges—even those based upon "probable cause"—are merely pending, a dentist, as was Dr. Mack, prior to the "hearing" involved here, remains actively practicing. It would seem clear that,

since the Court of Appeals again ruled although on different grounds, that the order of Dr. Mack's revocation was ineffective as based upon an invalid "hearing", he should be restored to his pre-hearing status, just as a prisoner convicted on a bailable offense may secure bail when his conviction has been reversed for a new trial. Holding otherwise has resulted in the anomaly of a constitutionally *void* proceeding's nevertheless having devastatingly *effective* results.

The issues of the proper effect to be given Federal Court determinations that a State professional disciplinary hearing is constitutionally invalid, and of whether the discipline which results from such a hearing should nevertheless remain in effect until another hearing is held are important ones which should be determined by this Court.

4. The Court of Appeals did rule that the prior proceeding was invalid; yet it also remanded Dr. Mack to a hearing before the same men, the Board, who had heard and reached a decision based upon it. This result is equivalent to reversing a criminal conviction or civil judgment because of improper admission of evidence or conduct of counsel, and then remanding for a new trial before the same members of the jury whose decision had been invalidated. Simple justice requires, it is submitted, direction that a new, independent, untainted fact-finder—such as the trial examiner specifically authorized by F.S. §120.24—be named to judge Dr. Mack on reversal. This Court should renew the holding to the contrary.

VII

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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By .....
ROBERT J. BECKHAM

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari have been mailed to ROBINSON & RANDLE, ESQS., First Bank & Trust Building, Jacksonville, Florida 32202, this 11th day of November, 1970.

.....
ROBERT J. BECKHAM

A. OPINION OF FIFTH CIRCUIT COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28085

DR. ROY F. MACK,
Plaintiff-Appellee,

versus

THE FLORIDA STATE BOARD OF DENTISTRY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(July 7, 1970)

Before BELL, COLEMAN, and AINSWORTH, Circuit Judges.

COLEMAN, Circuit Judge: Upon complaint, notice, and hearing the Florida State Board of Dentistry revoked the license of Dr. Roy F. Mack to practice in that State. Without filing any specific findings of fact, the Board held Dr. Mack to have been guilty of causing in the yellow pages of the Greater Miami Telephone Directory a listing for Palm Springs General Hospital with his private number, of advertising professional services at a greatly reduced cost to certain members of trade unions, and of taking improper personal liberties with female patients which would bring discredit upon the dental profession.

Dr. Mack first obtained review of the proceedings by the Fourth Florida District Court of Appeals. He argued that the procedure before the Dental Board was such that he was deprived of a fair and impartial hearing and that the Board's findings were not supported by substantial competent evidence. The Florida Court of Appeals, with no discussion of the events at the "hearing" held these contentions to be without merit and denied relief, 192 So.2d 66 (1966). The Supreme Court of Florida denied certiorari without written opinion.

Dr. Mack then filed an original suit in the United States District Court for the Southern District of Florida under the Civil Rights Act of 1871, 42 U.S.C.A., §1983, and the Fourteenth Amendment to the Federal Constitution, seeking the restoration of his license.

The opinion of the District Court disposing of the case is published, 296 F. Supp. 1259 (1968).

There is no point in paraphrasing the opinion here. Suffice it to say, the District Court decided two questions.

First, it held that the Board in proceeding to revoke a professional license was not limited to evidence beyond a reasonable doubt. With this we definitely agree, see 296 F. Supp. at 1262.

Second, the District Court held that "the mixing of functions of the Dental Board [investigating complaints, weighing the reports, filing charges, holding hearings, and deciding the merits (with its attorney conducting the "prosecution")] constituted a deprivation of procedural due process in contravention of the Fourteenth Amendment. For the reasons hereinafter set forth we modify the decision of the District Court on this question and do not decide issues not necessary to the decision of the controversy.

This Court has made an independent examination of the transcript [518 pages] of the purported hearing given Dr. Mack by the Dental Board on February 18, 1966. The hearing began at 9 o'clock in the morning and concluded at 11:35 o'clock that night. The Board declined to continue the hearings into the next day or to adjourn to some other day because that would inconvenience its members. It declined to leave the record open to allow the testimony of a prominent medical doctor who was temporarily absent in Atlanta. It declined to leave the record open to allow an examination by a urologist to determine whether Dr. Mack was impotent, which had become the paramount issue in the hearing.

The Dentist who presided over the hearing frankly stated that he was not a lawyer and was unfamiliar with the rules of evidence. This ordinarily would be of no particular moment, but Dr. Mack was represented by counsel and dozens of evidentiary questions arose. The chairman sustained at least ninety per cent of objections raised by its attorney, many times erroneously. He over-ruled about the same proportion of objections from Dr. Mack's counsel, often erroneously.

Dr. James Chimerakis, a licensed osteopathic physician, testified that he had examined Dr. Mack and found him to be impotent as the result of a rare disease. He produced x-rays of Dr. Mack which he had taken and which his assistant had developed. He said he knew of his own knowledge that the x-rays were of Dr. Mack. The Board excluded them because the written identification appeared on the envelope rather than on the film. The Board said the envelope might have been switched.

Most seriously of all, from the beginning of the "hearing" until its bitter end, one of the attorneys for the Board and one of the attorneys for Dr. Mack indulged in

continuous personal acrimony, charges and counter charges, attacking each other with unconcealed venom, both as to their personal attributes and their professional competency. An experienced judge would have nipped this in the bud and, if continued, these attorneys would no doubt have swiftly found themselves the objects of discipline. The chairman of course, did not know how to cope with this and made a very feeble effort to do so. It is no excuse to say that it was provoked by either side.

To get down to brass tacks, this was not a hearing. It was an ungoverned confrontation. We hold that Dr. Mack, as a matter of fact, has not had a hearing in that sense required of anything which claims to be an administrative hearing as known to the jurisprudence of this Country.

In so holding, we imply no affirmative criticism of the Board Members. They were not lawyers. Their mistake was in not selecting some competent attorney as a presiding officer, preferably acceptable to both sides, who could have kept the hearing within due bounds while the Board Members heard the evidence.

We do not intimate that such a procedure is Constitutionally required. We suggest it only as one way by which this situation may be avoided a second time around. Neither do we insinuate that administrative hearings must be conducted with all the formalities and strictures of a criminal case. They do not. A man who is about to lose a professional license which he has held for twenty years, however, is entitled to develop his defense in freedom from what took place in this case.

The judgment of the District Court will be affirmed on the sole ground that Dr. Mack has not had a hearing on the charges preferred against him. The case will be remanded to the District Court so that the Florida State

Dental Board may, if it wishes, conduct a lawful hearing within not more than sixty days after the receipt of our mandate in the District Court.

We indicate no view of the merits of this case. On the record as a whole it is seen that there was probable cause for the bringing of the charges. We hold, therefore, that a suspension of the license pending a hearing is neither unjust nor inequitable. The license will remain suspended as ordered by the District Court until a hearing can be held or until the expiration of the sixty day period as herein provided.

The District Court will give no directions to the Florida State Dental Board as to the modus operandi of its hearing. That is the responsibility of the Board and a duty for it to discharge, within the requirements of the Constitution.

As to a hearing for Dr. Mack, the standard of proof required, and the suspension of the dental license pending a hearing, as hereinabove set forth, the judgment of the District Court is affirmed.

In all other particulars, the judgment of the District Court is vacated.

The case will be remanded for further proceedings not inconsistent herewith.

AFFIRMED in part, and in part VACATED, and REMANDED.

B. JUDGMENT OF FIFTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 28085

D. C. Docket No. Civ-67-1344-TC

DR. ROY F. MACK,
Plaintiff-Appellee,

versus

THE FLORIDA STATE BOARD OF DENTISTRY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Before BELL, COLEMAN and AINSWORTH, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and vacated in part; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 7, 1970

Issued As Mandate:

C. ORDER DENYING PETITIONS FOR REHEARING

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28685

DR. ROY F. MACK,
Plaintiff-Appellee,

versus

THE FLORIDA STATE BOARD OF DENTISTRY,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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On Petition for Rehearing and Petition for Rehearing En Banc

(August 17, 1970)

Before BELL, COLEMAN, and AINSWORTH, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

D. DECISION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 67-1344-Civ-TC

DR. ROY F. MACK,
Plaintiff,

v.

THE FLORIDA STATE BOARD OF DENTISTRY,
Defendant.

Findings of Fact, Conclusions of Law, and Final Judgment

This cause came on for hearing before the Court sitting without a jury. After having considered the testimony and the proofs submitted, the file, and the advices of counsel, and being otherwise duly advised in the premises, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

This is a civil rights suit brought by a dentist whose license was revoked by the defendant. The action is brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Fourteenth Amendment of the Federal Constitution. The Court has jurisdiction both under the Federal Question Statute, 28 U.S.C. § 1331, (the Court finding that the value of the nature of the right sought to be protected is in excess of $10,000.00 exclusive of interest and costs), and under the Civil Rights Jurisdiction Statute, 28 U.S.C. 1343(4).

Prior to April 1, 1966, plaintiff was a licensed practicing dentist in the Southern District of Florida. The defendant Florida State Board of Dentistry (the Board),

formerly known as the Florida State Board of Dental Examiners, exists under Florida Statutes, Chapter 466, as a regulatory and disciplinary agency for the practice of dentistry in the State of Florida. As such, the Board's actions complained of in the instant suit were done under color of state law. Accordingly, any action by the Board was state action so as to raise the questions under the Fourteenth Amendment and the Civil Rights Act.

In the Fall of 1965 certain complaints concerning plaintiff's practice were received by the Board through its Executive Secretary, then a Dr. Robert M. Denton. At a Board meeting held in Homosassa Springs, Florida, on October 2, 1965, Dr. Denton reported to the Board the fact of and nature of the complaints received concerning the plaintiff. Following the receipt of this information, the Board, apparently pursuant to its Rule 3.02, authorized Dr. Denton to more fully investigate the charges through the use of one Thor Behrans, a Miami private detective. During the progress of the investigation some or all the members of the Board were kept "well apprised" of its progress, as were Dr. Denton and Mr. Richard Randle, attorney for the Board. In fact, Dr. Denton made one trip to Miami to personally interview some of the witnesses.

The results of the investigation were made known to the Board under the authority of its Rule 3.03(a) and in late 1965, based on the investigation reports, the Board authorized the filing of an accusation against plaintiff, charging improper advertising of his name and services and misconduct which would bring discredit upon the dental profession. The accusation, which is in the nature of an indictment or information, was sworn to by Dr. Denton and then circulated to members of the Board who authorized holding of a hearing. This procedure follows Rule 3.05(a), (c). The hearing was originally set for January,

1966, but because of some technical problems it was required to be re-set and was held on February 18, 1966.

During the pre-hearing stages of the case, Dr. Mack was represented by counsel who filed certain motions with the Board which were referred to Mr. Randle for disposal. Mr. Randle stated that the motions had been, at least in most respects, denied. It is unclear from the record whether this was an independent determination on the part of Mr. Randle or was delegated to him by the Board itself. In any event, at the hearing the Board apparently delegated to Mr. Randle and Dr. Denton the decisions concerning whether counsel could have access to the documents called for by the motions. While the hearing was purportedly an adversary proceeding, in effect Mr. Randle, the prosecutor, was acting on behalf of the Board both in prosecuting and in rendering legal advice. Mr. Randle sat with the members of the Board behind a table facing the accused. He often conferred with the Chairman concerning rulings out of the hearing of the court reporter or defense counsel. Prior to the hearing he had prepared a "format" for the Chairman, the contents or existence of which were unknown to opposing counsel. He was present during executive sessions taken by the Board to consider rulings concerning the trial. Although the Board purported to make independent rulings concerning evidentiary matters, some of which were of great importance at the trial, the record reveals that the Board, none of whom are lawyers, relied upon Randle to guide it in legal and evidentiary matters. As Dr. Farver, a Board member, candidly stated, "Well, we have to rely on him for legal aid and we believe what he says. So, if he does not want to admit it, fine."

In sum, both under the rules of the Board, 3.06(a), and Mr. Randle's practice, his function was that of "assisting the Board" in prosecuting the accused.

At the conclusion of the hearing the Board adjourned until the following morning. At that time they met in executive session to consider the evidence and make a determination of guilt or innocence and to determine the punishment, if any. Both Dr. Denton and Mr. Randle were present during the course of the executive session. The plaintiff was found guilty and his license to practice dentistry was revoked. Mr. Randle was authorized to and did prepare the formal findings which merely track the accusation previously filed. It is stipulated between the parties that the standard of proof used by the Board was less than the so-called reasonable doubt test as employed in criminal trials.

The plaintiff attempted unsuccessfully to overturn the revocation in the state courts, *Mack* v. *Pepper*, 192 So.2d 66 (Fla. 3d Dist. 1966), *cert.* denied, 201 So.2d 551 (Fla. 1967). Thereupon, this petition was filed.

There are two questions to be decided by the Court, although discussed by defendant under four subdivisions. They are: (1) whether the Board, in proceedings to revoke a professional license such as this, is required to use the reasonable doubt test, and (2) whether the mixing of functions outlined in the foregoing resulted in a deprivation of plaintiff's rights to procedural due process. It should be pointed out that the plaintiff does not complain here of a denial of proper notice, or counsel, or the right to confrontation and cross-examination. The scope of this review, insofar as the second question is concerned, is strictly limited to the constitutional propriety of the mixing of functions, as here outlined.

With respect to the standard of proof argument raised by plaintiff under the first question, the Court must point out that it is not being asked to determine what standard must be followed in an administrative proceeding such as

this, but rather whether the proof must be such as to satisfy the reasonable doubt standard. As the Supreme Court has stated:

> It is of course within the power of the state to regulate procedures under which its laws are carried out, including . . . the burden of persuasion, "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser* v. *Randall*, 357 U.S. 513, 523, 78 S.Ct. 1332, 1341 (1958).

While, as plaintiff points out, there may be an "interest of transcending value" involved here, the Court cannot say that the reasonable doubt test as applied to non-criminal matters is "rooted in the traditions and conscience of our people."

The plaintiff erroneously relies upon the case of *United States* v. *Costanzo*, 395 F.2d 441 (4th Cir. 1968), as authority for his contention that proof before the Board must be beyond a reasonable doubt. That case, extending the reasonable doubt test to federal juvenile proceedings, specifically held that "a federal juvenile proceeding which may lead to institutional commitment must be regarded as *criminal*." *United States* v. *Costanzo*, *supra* at 444. [Emphasis supplied.] Accordingly, it is apparent that the Board was not required to use the "beyond a reasonable doubt" standard.

Turning to the second question, involving the charge of an unconstitutional mixing of functions, the facts here show an extreme example of the complaint of mixing. The adjudicator of fact, first, authorized an investigation, second, was kept well apprised of the facts as they developed, and finally, authorized the filing of the charges.

In addition, at the hearing which was to be adversary in nature, the attorney, Mr. Randle, wore two hats: that

of legal advisor to the supposedly impartial adjudicators of fact, as well as that of advocate for the prosecution. Prior to the proceedings, as well as at one point during the proceedings, the Board in effect delegated to the prosecutor the function of making the decisions on motions made by plaintiff's counsel. Furthermore, it is tacitly admitted that as to certain objections to questions propounded by Mr. Randle, the Board's legal advisor and prosecutor, he (Mr. Randle) in effect made the ruling.

Thus, we have the anomalous situation of Mr. Randle asking a question, plaintiff's counsel objecting, whereupon the Board turned to Mr. Randle for advice as to whether his question was objectionable, and of course, when he said that it was not, the objection was overruled. Likewise, at the times when the Board went into executive session, once to consider admission of exhibits, and once to make a final decision, the Executive Secretary, who swore to the accusation and acted as a liaison between the Board and the investigations, as well as the prosecutor, were present.

Translating the proceedings into criminal procedural terms, we have here a dentist of twenty years' practice, who has permanently lost the privilege to practice his profession, as the result of pre-trial proceedings and final hearing where the petit jury was made up of the same members as the grand jury; where the prosecuting attorney acted in some respects as the judge; where the foreman of the grand jury and and the chief investigator for the state (Dr. Denton) sat with the jury; and finally, when the jury retired to deliberate, they did so in the presence of the prosecuting attorney and the so-called chief investigator, Dr. Denton. Were this a criminal trial being discussed, it could only be characterized as foreign to our notions of fairness and justice and some-

what reminiscent of the Star Chamber proceedings which have hopefully been relegated to history.

The contention by the Board here is that while these procedures would not pass muster in a criminal trial setting, they are perfectly all right where all the defendant has to lose is his privilege to practice a profession in which he has been engaged for over twenty years. However, we think that *In re: Ruffalo*, ...U.S. ....., 88 S.Ct. 1222 (1968), teaches otherwise. That case, which involved the procedure followed in disbarment of a lawyer, held that these proceedings are adversary and of a quasi-criminal nature. Although *In re: Ruffalo, supra,* dealt with notice as an element of due process, the mixing of functions and appearance of unfairness such as we have here have not been beyond the condemnation of other courts. *American Cyanamid Co.* v. *Federal Trade Comm.*, 363 F.2d 757 (6th Cir. 1966), and *Amos Treat & Co., Inc.* v. *Securities and Exchange Comm.*, 306 F.2d 260 (D.C. Cir. 1962), as well as state courts, *Glass* v. *Mackie*, 370 Mich. 482, 122 N.W.2d 651 (1963).

Accordingly, it is apparent that the following actions of the Board, taken together, deprived the plaintiff of the fundamental fairness required by the Constitution:

1. The adjudicator of fact being kept apprised of the facts of the investigation prior to the hearing.

2. The adjudicator of fact having the authority to authorize the filing of an accusation.

3. The legal advisor to the adjudicator of fact making decisions for the Board and also acting as prosecuting attorney.

4. The prosecuting attorney being present during deliberative sessions where defense counsel was not accorded the same right.

5. The Executive Secretary, who had charge of the investigation, being present during deliberative sessions of the adjudicator of fact.

While the requested relief of the plaintiff was restoration to his pre-hearing status, the Court is of the opinion that all he is entitled to is a new hearing with the procedures here condemned eliminated. This may be done by appointment of an independent special master or hearing officer for the purpose of taking testimony and making findings, or it may be done by such other procedures as may be devised so as to assure that fundamental fairness required by the United States Constitution and which was so noticeably lacking in the proceedings heretofore conducted by the Board.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter and the parties of this action.

2. The Board was not required to use the "beyond a reasonable doubt" standard in judging whether the accused, the plaintiff here, was guilty of the charges made against him, and the plaintiff was not deprived of due process of law under the Fourteenth Amendment to the United States Constitution by reason thereof.

3. The mixing of functions by the Board, as outlined in the Findings of Fact, deprived the plaintiff of procedural due process of law contrary to the provisions of the due process clause of the Fourteenth Amendment to the United States Constitution.

FINAL JUDGMENT

Accordingly, it is ORDERED and ADJUDGED that:

I. The order of revocation of license of plaintiff, Dr. Roy F. Mack, to practice dentistry in the State of Florida, issued by defendant, The Florida State Board of Dentistry, and effective April 1, 1966, be and the same is hereby declared null and void.

II. Defendant, The Florida State Board of Dentistry, is ordered and directed to provide plaintiff, Dr. Roy F. Mack, a new hearing in accordance with the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution, on the charges heretofore brought against him, within 120 days from the date hereof, or on failure to do so to issue to Dr. Roy F. Mack, upon application, the necessary license and renewals thereof to practice dentistry in the State of Florida.

III. Plaintiff shall recover from defendant his costs incurred in and about this action, to be later taxed.